

WEDNESDAY, DECEMBER 27, 2023

PERSPECTIVE

A landlord's guide to assistive animals

By Pamela Westhoff
and Meigan Everett

With the surge of return to work policies cropping up throughout the US, we have received an uptick of landlord inquiries about pets and animals in leased spaces. While it is a landlord's prerogative to prohibit pets in their leases, not all animals are pets. In this article, we discuss the process for distinguishing pets from assistive animals (as defined below) and provide an in-depth guide for landlords on addressing the presence of assistive animals in leased spaces.

The difference between assistive and service animals, and pets

Under California employment law, an "Assistive Animal" is either a Service Animal or an emotional support animal ("ESAs"). A "Service Animal" is a trained dog or miniature horse that performs tasks for a person with a disability, such as a seeing eye dog. ESAs are any type of animal that provides comfort and support to individuals with emotional or mental health disabilities, or medical conditions that are perceived as a disability (whether or not the employee is actually disabled). While ESAs are not trained to perform specific tasks, their presence can alleviate symptoms and improve their owner's quality of life. Assistive animals are not considered pets under California employment law.

Which assistive animals are landlords required to open doors to? Under the Americans with Dis-



Shutterstock

abilities Act, Service Animals are allowed to accompany their owners inside businesses and public places to any place the public can go. Landlords are required to let Service Animals into their buildings with limited authority, as discussed further below. Landlords that violate this law can incur fines up to \$55,000 for the initial violation and \$100,000 thereafter.

Under California's Fair Employment and Housing Act, employers (excluding religious organizations)

are required to provide a reasonable accommodation for ESAs if they have five or more full or part-time employees, unless there is an undue hardship. A lease that prohibits ESAs is an undue hardship and the request can likely be denied, which employers should confirm with the assistance of legal counsel.

Developing policies: Creating an inclusive property for employees of tenants with disabilities involves understanding and managing assistive animals.

Service animal policies: Owners of Service Animals do not need to disclose that they have a Service Animal. If their disability is apparent, the landlord cannot ask for proof that the animal is a Service Animal. If the disability is not apparent, the only questions that can be asked are (1) Is the animal required because of the owner's disability? and (2) What task does the animal perform? The tenant can answer these questions by providing a credible statement, *i.e.*, one a reasonable

person would believe, or by submitting documentation from a third party who is in a position to know about the disability and disability-related need for the Service Animal. If a third party provides the documentation, a landlord can assess the reliability of the third party, contact the third party to verify they provided the documentation and ask the above referenced questions. As for rules, Landlords can require that the Service Animal be housebroken and under the control of its handler (leashing can only be required if it does not impede the animal's service).

ESA policies: Since landlords are not required to allow ESAs, they have total discretion to adopt rules for ESAs. Understanding the employer requirements for ESA accommodations is a good guide for landlords drafting ESA policies. To avoid discrimination claims, landlords do not want to get involved in the process between the employer and employee. Therefore, a written policy which is easy for the tenant to follow is essential.

ESAs do not have to be a new animal for the owner, they can be the owner's existing dog, cat, bird, etc. Further, employers cannot prohibit a certain type of animal from being an ESA (pit bull, alligator, etc.), unless it is established that the animal

is a current threat to others, *i.e.*, is an active significant risk to cause bodily harm or property damage. See "Wally the emotional support alligator went to see the Phillies. Then he went viral," NPR, Sept. 29, 2023. This must be established by actual, recent incidents of bad behaviors versus mere fear that an incident might occur. For example, if a dog bit someone a year ago or if the breed is known for being aggressive, that alone is not enough to make the animal a current risk. Landlords can, however, address these risks, by limiting the types and breeds of animals they allow.

Also, since employees are entitled to multiple ESAs, landlords should consider how many ESAs a tenant can have in its premises. A straight forward approach is a per square footage allowance or per premises policy.

Before authorizing an ESA in the premises, landlords should request documentation supporting the need for an ESA, such as a letter from a licensed mental health professional. This letter should confirm the individual's disability and state that the presence of the animal alleviates symptoms or provides support. In California, the health care professional must (i) have a valid California license for their profession, (ii) disclose the license in the letter,

and (iii) have a relationship with the employee for at least 30 days prior to providing the letter. Landlords can also require other documentation (*i.e.*, vaccinations, licensing, weight), can restrict areas of access (*i.e.*, elevators, common areas), and can prohibit sick animals.

Resolving conflicts: Landlords should take prompt and considerate action when responding to violations arising from assistive animals. Preemptively, Landlords can require indemnities to cover damages in the lease or in its approval for an ESA and establish a procedure to rescind the right to

have the animal in the premises for owners that violate the rules. Further, assistive animal owners are required to repair any damage caused by the assistive animal or reimburse landlord therefor.

Conclusion: By adhering to legal requirements and implementing proper procedures, landlords can successfully manage the presence of assistive animals in leased spaces while limiting their risks and liabilities. Remember, seeking guidance from legal experts can provide invaluable assistance in navigating specific cases involving assistive animals.

Pamela Westhoff is a partner, and **Meigan Everett** is an associate in the Real Estate, Energy, Land Use & Environmental Practice Group at Sheppard Mullin.

